Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 4 February 2025 [1]

Case C-544/23

T.T.,
BAJI Trans, s. r. o.
v
Národný inšpektorát práce

(Request for a preliminary ruling from the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic))

(Reference for a preliminary ruling – Regulation (EEC) No 3821/85 – Obligation to carry out periodic inspections of tachographs – Exceptions – Charter of Fundamental Rights of the European Union – Last sentence of Article 49(1) and Article 51(1) – Principle of the retroactive application of the more lenient criminal law – Administrative penalties of a criminal nature – Criteria – Appeal in cassation – New law which entered into force subsequent to the judgment under appeal)

I. Introduction

1. Proceedings concerning administrative penalties differ from proceedings concerning criminal penalties, as a general rule, in three respects. First, criminal penalties in the strict sense are adopted by a court, whereas administrative penalties are adopted by administrative authorities, with the court becoming involved only at the review stage. Second, the procedural rules applying to administrative penalties are not generally those which apply to criminal penalties, but those governing administrative proceedings and disputes. [2] Third, in the majority of Member States the type of courts before which administrative penalties are reviewed is not the same as those before which criminal penalties are determined. [3]

[1] Original language: French.

[2] However, according to Research Note 24/002 produced by the Research and Documentation Directorate of the Court of Justice of the European Union ('Research Note 24/002'), there are exceptions within the Member States. For example, in *Germany* and *Portugal* the provisions governing criminal proceedings are applicable, in substance and unless otherwise provided, *mutatis mutandis* to proceedings before an administrative authority concerning the adoption of an administrative fine.

[3] Nevertheless, in some Member States such as the *Federal Republic of Germany* and the *Portuguese Republic*, the review of fines imposed by administrative authorities does not fall within the jurisdiction of administrative courts, but rests with the ordinary courts, which also have jurisdiction in criminal matters, both at first instance and at second instance.

2. In the present case, the Court is called upon to clarify the scope of the principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union, [4] in the context of the judicial review of an administrative penalty at the stage of an appeal in cassation.

3. That principle is linked to the principle of necessity and proportionality of penalties. In so far as penalties imposed must be necessary and proportionate, that is to say, they must punish the perpetrator of an offence for the acts he or she has committed and be commensurate with the severity of those acts, as is provided in Article 49(3) of the Charter, the imposition of a penalty would no longer appear to be justified if, subsequent to the commission of the acts, the legislature had revised its assessment either of the objectionable nature of those acts or of the nature or level of the penalty now incurred.

4. In that context, the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) asks the Court, in particular, whether the principle of the retroactive application of the more lenient criminal law must be applied by a court of cassation in a dispute concerning an administrative penalty, where the more lenient law entered into force subsequent to the decision given by the lower administrative court ruling on the substance, which has become final under national law and against which an appeal in cassation has been lodged.

5. That question gives the Court an opportunity to clarify whether, in that situation, the specific characteristics of the function of the court of cassation could affect the scope of that principle.

II. Legal framework

A. European Union law

1. Regulation (EEC) No 3821/85

6. As it was applicable on the date when the offence at issue in the main proceedings was committed, Article 3(1) and (2) of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport, [5] as amended by Council Regulation (EU) No 517/2013 of 13 May 2013, [6] provided:

‘1. Recording equipment shall be installed and used in vehicles registered in a Member State which are used for the carriage of passengers or goods by road, except the vehicles referred to in Article 3 of Regulation (EC) No 561/2006 [7] …

2. Member States may exempt vehicles mentioned in Articles 13(1) and (3) of Regulation [No 561/2006] from application of this Regulation.’

[4] ‘The Charter’. In the following analysis, I will also refer to that principle as the principle of retroactivity *in mitius*, which has the same meaning. Furthermore, that principle should be understood as being the one enshrined in the last sentence of Article 49(1) of the Charter, even though I will not indicate it systematically for ease of reading.

[5] OJ 1985 L 370, p. 8.

[6] OJ 2013 L 158, p. 1 (‘Regulation No 3821/85’).

[7] Regulation of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 2006 L 102, p. 1).

7. Article 19(1) of Regulation No 3821/85 provided:

‘Member States shall, in good time and after consulting the [European] Commission, adopt such laws, regulations or administrative provisions as may be necessary for the implementation of this Regulation.

Such measures shall cover, inter alia, the reorganisation of, procedure for, and means of carrying out, checks on compliance and the penalties to be imposed in case of breach.’

8. The first paragraph of point 3(a) of Chapter VI of Annex I to that regulation stated:

‘Periodic inspections of the equipment fitted to vehicles shall take place at least every two years and may be carried out in conjunction with roadworthiness tests of vehicles.’

9. Regulation No 3821/85 was repealed, with effect from 2 March 2016, by Article 47 of Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport. [8]

2. Regulation No 165/2014

10. Article 3(1) and (2) of Regulation No 165/2014 provides:

‘1. Tachographs shall be installed and used in vehicles registered in a Member State which are used for the carriage of passengers or goods by road and to which Regulation [No 561/2006] applies.

2. Member States may exempt from the application of this Regulation the vehicles mentioned in Article 13(1) and (3) of Regulation [No 561/2006].’

11. Article 23(1) of Regulation No 165/2014 provides:

‘Tachographs shall be subject to regular inspection by approved workshops. Regular inspections shall be carried out at least every two years.’

12. Article 41(1) of that regulation states:

‘Member States shall, in accordance with national constitutional arrangements, lay down rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate, dissuasive and non-discriminatory, and shall be in compliance with the categories of infringements set out in Directive 2006/22/EC [9].’

8 OJ 2014 L 60, p. 1.

9 Directive of the European Parliament and of the Council of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC (OJ 2006 L 102, p. 35).

13. The second paragraph of Article 48 of that regulation provides:

'[This regulation] shall … apply with effect from 2 March 2016 …'

3. Regulation No 561/2006

14. Article 1 of Regulation No 561/2006 provides:

'This Regulation lays down rules on driving times, breaks and rest periods for drivers engaged in the carriage of goods and passengers by road in order to harmonise the conditions of competition between modes of inland transport, especially with regard to the road sector, and to improve working conditions and road safety. This Regulation also aims to promote improved monitoring and enforcement practices by Member States and improved working practices in the road transport industry.'

15. Article 3 of that regulation lists the categories of vehicles undertaking carriage by road to which that regulation does not apply. Vehicles used for the delivery of ready-mixed concrete are not listed.

16. Article 13(1) of Regulation No 561/2006 lists the categories of vehicles undertaking carriage in respect of which, provided the objectives set out in Article 1 of that regulation are not prejudiced, Member States may grant exceptions from Articles 5 to 9 of that regulation.

17. In the version of Regulation No 561/2006 in force at the time of the offence committed by T.T., vehicles used for the delivery of ready-mixed concrete were not listed.

18. Since the entry into force of Regulation (EU) 2020/1054[10] on 20 August 2020, 'vehicles used for the delivery of ready-mixed concrete' have been listed in Article 13(1)(r) of Regulation No 561/2006.

B. Slovak law

19. Article 50(6) of the Ústava Slovenskej republiky (Constitution of the Slovak Republic) provides:

'The criminal nature of any act shall be determined and the penalty for that act shall be imposed under the law effective at the time of the commission of the act. A more recent law shall apply if it is more favourable to the perpetrator of the offence.'

[10] Regulation of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs (OJ 2020 L 249, p. 1).

20. Paragraph 1(a) of zákon č. 461/2007 Z. z. o používaní záznamového zariadenia v cestnej doprave (Law No 461/2007 on the use of recording equipment in road transport) of 13 September 2007 ('Law No 461/2007') provides:

'This Law regulates legal relations not covered by special regulations [reference to Regulation No 3821/85] concerning:

(a) the scope of the obligation to install and use recording equipment … in motor vehicles …'

21. Paragraph 2 of that Law is worded as follows:

'1. Unless otherwise provided by this Law, a transport undertaking which provides bus or road freight transport services shall ensure that recording equipment is installed in each vehicle used for the carriage of passengers or goods and that record sheets and [driver's] cards are used for its operation.

2. The obligation incumbent on the transport undertaking under subparagraph 1 shall not apply to vehicles used for carriage referred to by a specific provision [reference to Article 3 and Article 13(1) of Regulation No 561/2006].'

22. Paragraph 38(1)(a)(1) of zákon č. 462/2007 Z. z. o organizácii pracovného času v doprave a o zmene a doplnení zákona č. 125/2006 Z. z. o inšpekcii práce a o zmene a doplnení zákona č. 82/2005 Z. z. o nelegálnej práci a nelegálnom zamestnávaní a o zmene a doplnení niektorých zákonov v znení zákona č. 309/2007 Z. z. (Law No 462/2007 on the organisation of working time in transport and amending and supplementing Law No 125/2006 on labour inspection and amending and supplementing Law No 82/2005 on illegal work and illegal employment and amending and supplementing certain laws, as amended by Law No 309/2007) of 13 September 2007 ('Law No 462/2007') provides:

'An offence is committed by a driver who

(a) drives a vehicle

1. without recording equipment or with recording equipment which has not undergone a valid periodic inspection or uses recording equipment incorrectly.'

III. Facts of the dispute in the main proceedings and questions referred for a preliminary ruling

23. By an administrative decision of 8 December 2016, T.T. was found guilty of infringing Paragraph 38(1)(a)(1) of Law No 462/2007 on the ground that, on 4 November 2015, he had carried concrete on board a vehicle belonging to BAJI Trans, s. r. o., the tachograph of which had not undergone a valid periodic inspection since 25 June 2015. For that reason, T.T. was ordered to pay a fine of EUR 200.

24. The complaint against that decision was rejected by decision of the Národný inšpektorát práce (National Labour Inspectorate, Slovakia) of 3 April 2017.

25. T.T. and BAJI Trans brought an action against those administrative decisions before the Krajský súd v Bratislave (Regional Court, Bratislava, Slovakia), claiming that the vehicle for the carriage of concrete in question was excluded from the category of vehicles subject to the obligation to use a tachograph.

26. By decision of 27 March 2019, the Krajský súd v Bratislave (Regional Court, Bratislava), acting in its capacity as an administrative court, dismissed the action brought by T.T. as unfounded, while the action brought by BAJI Trans was dismissed on grounds of a lack of legal standing.

27. That court held, inter alia, that the obligation to use a tachograph in all road transport vehicles was laid down in Article 3 of Regulation No 3821/85 and in Paragraph 2(1) of Law No 461/2007, without prejudice to the exceptions listed in Articles 3 and 13 of Regulation No 561/2006. However, vehicles for the carriage of concrete were not listed among those exceptions with the result that the obligation to use a tachograph applied in full to such vehicles.

28. On 15 July 2019, T.T. and BAJI Trans lodged an appeal in cassation against that decision before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

29. In the course of the proceedings relating to the appeal in cassation, on 24 August 2020 T.T. and BAJI Trans submitted a defence in which they asserted that Regulation No 561/2006 had been amended by Regulation 2020/1054.

30. Jurisdiction to hear that appeal was transferred, after the appeal had been lodged, to the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic), which is the referring court.

31. First, that court states that the national laws were adopted in order to implement Regulations No 3821/85 and No 165/2014, that is to say, not only the obligations laid down by those regulations but also the obligation to establish a system of penalties for failure to fulfil those obligations. The referring court infers that the competent administrative authority applied Union law for the purposes of Article 51(1) of the Charter when it decided on the guilt of T.T. and on the penalty to be imposed on him. That court wishes to know whether, by interpreting the relevant national legislation adopted pursuant to Union law and by ensuring the judicial protection of T.T., it is also implementing Union law within the meaning of that provision of the Charter.

32. Second, that court wishes to obtain express confirmation from the Court of Justice that, as is the case with Article 6(1) and Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms,[11] Article 49(1) of the Charter imposes on administrative authorities the obligation to apply the principle of the retroactive application of the more lenient criminal law, with the resulting need also to apply that principle in judicial review proceedings before an administrative court.

33. Third, the referring court asks whether the principle of the retroactive application of the more lenient criminal law must be applied by the court hearing an appeal in cassation brought against the decision of a lower administrative court rejecting the complaint raised against an administrative penalty, when the new law entered into force subsequent to that decision. The

[11] Signed in Rome on 4 November 1950 ('ECHR').

referring court is thus uncertain as to the scope of the last sentence of Article 49(1) of the Charter in the context of the examination of an appeal in cassation, given the specific characteristics of such proceedings.

34. In those circumstances the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 51(1) of the [Charter] to be interpreted as meaning that a Member State is implementing Union law when it imposes, under national law, an administrative penalty for failure to fulfil an obligation where that obligation arises from EU law and the Member States are required to penalise failure to fulfil it, as in the case of Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014?

(2) If the answer to the first question is in the affirmative, are Article 49(1) of the [Charter] and the principle of *lex posterior mitius* laid down therein to be interpreted as also applying to the imposition of penalties for administrative offences in cases where the guilt and the penalty are first decided not by a judicial body but by an administrative body, and does this principle then also apply to the review of the decisions of that administrative body by an administrative court?

(3) If the answer to the second question is in the affirmative, are Article 49(1) of the [Charter] and the principle of *lex posterior mitius* laid down therein to be interpreted as applying to national administrative or judicial proceedings, regardless of the current stage of those proceedings?

(4) If the answer to the third question is in the negative, by what criteria should that stage be determined? More specifically, are Article 49 of the [Charter] and the principle of *lex posterior mitius* laid down therein to be interpreted as applying in the context of contentious administrative proceedings concerning an appeal in cassation, and must a court such as [the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic)] before which that appeal in cassation has been brought at second and final instance therefore take into account a legislative amendment in favour of the perpetrator of the administrative offence which was the subject of the proceedings before an administrative body, rather than a court, that amendment having been introduced only after the decision of the lower administrative court, that is subject to review by [the court hearing the appeal in cassation], was delivered and became final?'

35. The National Labour Inspectorate, the Slovak and Italian Governments and the Commission submitted written observations. T.T. and BAJI Trans, the Slovak and Italian Governments and the Commission participated in the hearing held on 24 September 2024, in the course of which they, inter alia, responded to questions for oral answer put by the Court.

IV. Analysis

A. The first question referred for a preliminary ruling

36. By this question, the referring court wishes to ascertain whether Article 51(1) of the Charter is to be interpreted as meaning that a Member State is implementing Union law, within the meaning of that provision, first, when it provides for the imposition of an administrative penalty in the case

of failure to fulfil the obligations relating to the presence of a tachograph in vehicles carrying goods and its periodic inspection, in accordance with Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014, and, second, in the judicial review of that penalty.

37. There is no doubt, in my view, that this question must be answered in the affirmative.

38. It should be noted, in that regard, that the scope of the Charter is defined in Article 51(1) thereof, under which, in so far as the action of the Member States is concerned, the provisions of the Charter are addressed to them only when they are implementing Union law.

39. According to the Court, the fundamental rights guaranteed in the legal order of the European Union are thus applicable in all situations governed by EU law, but not outside such situations. [12]

40. It follows from the Court's settled case-law that the concept of 'implementation of Union law', within the meaning of Article 51(1) of the Charter, presupposes a degree of connection between an act of EU law and the national measure at issue above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other. [13]

41. Accordingly, in order to determine whether a national measure involves 'implementing Union law' within the meaning of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether the national legislation at issue in the main proceedings is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it. [14]

42. In the present case, both Regulation No 3821/85, which was applicable on the date when the offence was committed, and Regulation No 165/2014, which repealed it, require the presence of a tachograph in vehicles carrying goods as well as its periodic inspection. Furthermore, those regulations require Member States, in Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014 respectively, to penalise infringements of their provisions. A Member State is implementing Union law, within the meaning of Article 51(1) of the Charter, where it is discharging an obligation, laid down in a provision of Union law, to provide for penalties for the offences referred to by that provision. [15] Consequently, by imposing an administrative fine such as that at issue in the main proceedings, the Slovak authorities implemented Union law.

43. The same holds for the judicial review of that fine.

44. Thus, since the application of Regulations No 3821/85 and No 165/2014 by a national court constitutes an implementation of Union law within the meaning of Article 51(1) of the Charter, that court must, in carrying out that review, comply with the requirements flowing from the fundamental rights enshrined in the Charter. [16]

[12] See, inter alia, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19); of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 26); and of 29 July 2024, *protectus* (C-185/23, EU:C:2024:657, paragraph 41).

[13] See, inter alia, judgment of 29 July 2024, *protectus* (C-185/23, EU:C:2024:657, paragraph 42 and the case-law cited).

[14] See, inter alia, judgment of 29 July 2024, *protectus* (C-185/23, EU:C:2024:657, paragraph 43 and the case-law cited).

[15] See, to that effect, inter alia, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 24 to 28); of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 18 to 21); and of 19 October 2023, *G. ST. T. (Proportionality of the penalty for trade mark infringement)* (C-655/21, EU:C:2023:791, paragraph 43).

[16] See, inter alia, judgment of 4 October 2024, *Real Madrid Club de Fútbol* (C-633/22, EU:C:2024:843, paragraph 41 and the case-law cited).

45. It is true that the questions referred for a preliminary ruling arise because the Slovak legislature has now exempted vehicles transporting ready-mixed concrete from the obligation to be fitted with a tachograph. However, in introducing that exception, the legislature merely implemented the option made available to it by both Article 3(2) of Regulation No 3821/85 and Article 3(2) of Regulation No 165/2014. Where a Member State makes use of a margin of discretion which is an integral part of the regime established by an act of Union law, it must be regarded as implementing that law within the meaning of Article 51(1) of the Charter. [17]

46. I would recall in that respect that, under Paragraph 2(1) of Law No 461/2007, any vehicle belonging to a road freight transport undertaking that is used for the carriage of goods must be fitted with a tachograph. However, under Paragraph 2(2) of that law, the vehicles mentioned in Article 13(1) of Regulation No 561/2006 are not to be subject to that obligation. By making a dynamic reference to that provision, the Slovak legislature thus availed itself of the option made available to it by both Article 3(2) of Regulation No 3821/85, which was applicable on the date when the offence was committed, and Article 3(2) of Regulation No 165/2014, which repealed Regulation No 3821/85 with effect from 2 March 2016. Under both provisions, the vehicles mentioned in Article 13(1) of Regulation No 561/2006 may be exempted by Member States from the obligation to be fitted with a tachograph. [18]

47. That latter provision lists the types of vehicles in respect of which Member States are authorised to grant exceptions from the obligations (relating to minimum age and working time and rest periods for drivers) laid down in Articles 5 to 9 of that regulation. Until the entry into force of Regulation 2020/1054, vehicles used for the delivery of ready-mixed concrete were not listed. Consequently, they were not among the vehicles subject to Paragraph 2(2) of Law No 461/2007. However, with effect from 20 August 2020, the date of entry into force of Regulation 2020/1054, such vehicles were automatically included in the list of vehicles mentioned in Paragraph 2(2) and were therefore exempted by the Slovak legislature from the obligation to be fitted with a tachograph.

B. The second question referred for a preliminary ruling

48. By its second question, the referring court asks, in essence, whether the principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter, is to be interpreted as applying both at the time of the imposition of administrative penalties in accordance with Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014 and at the time of the judicial review of such penalties.

1. Whether the principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter, applies to administrative penalties of a criminal nature

49. In accordance with the last sentence of Article 49(1) of the Charter, the principle of the retroactive application of the more lenient criminal law requires that, if, after the commission of an offence, the law provides for a lighter penalty, that penalty must be applied. [19]

[17] See, inter alia, judgments of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraph 50 and the case-law cited), and of 29 July 2024, *protectus* (C-185/23, EU:C:2024:657, paragraph 59).

[18] See, in that regard, judgment of 7 February 2019, *NK* (C-231/18, EU:C:2019:103, paragraph 19).

[19] See, inter alia, judgment of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraph 106).

50. As is stated in the Explanations relating to the Charter of Fundamental Rights,[20] Article 49(1) of the Charter is applicable in criminal matters.

51. Consequently, in order to determine whether that provision is applicable, it must be examined whether a measure such as the administrative penalty at issue in the main proceedings is criminal in nature.

52. According to the Court's settled case-law on the interpretation of Article 50 of the Charter and transposed into Article 49(3) thereof, three criteria ('the *Engel* criteria'[21]) are relevant for assessing the criminal nature of a penalty: the first is the legal classification of the offence under national law; the second is the intrinsic nature of the offence; and the third is the degree of severity of the penalty which the person concerned is liable to incur.[22]

53. Even in the case of offences which are not classified as 'criminal' by national law, the intrinsic nature of the offence in question and the degree of severity of the penalties to which it is liable to give rise may nevertheless result in its being criminal in nature.[23]

54. Although it is for the referring court to assess, in the light of those criteria, whether the measure at issue in the main proceedings is criminal in nature for the purposes of Article 49(1) of the Charter, the Court, when giving a preliminary ruling, may nevertheless provide clarification designed to give the referring court guidance in its assessment.[24]

55. With regard to the *first criterion*, concerning the *classification of the offence under national law*, the offence committed by T.T. does not appear to be regarded as a criminal offence under Slovak law.

56. As regards the *second criterion*, relating to the *intrinsic nature of the offence*, it must be ascertained whether the measure at issue has, inter alia, a *punitive purpose*, which is the hallmark of a penalty of a criminal nature for the purposes of Article 49 of the Charter.[25] In that regard, the Court has held that the mere fact that the penalty at issue also pursues a deterrent purpose does not mean that it cannot be characterised as a 'criminal penalty'. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature.[26]

57. In the present case, it is not disputed that, in providing for the obligation for certain categories of vehicles to have a tachograph and to submit it for periodic inspections, the EU legislation pursues objectives consisting in improving both the social conditions of employees who are covered by that legislation and road safety.[27] There is no doubt that the penalties which Member States are required to introduce aim to punish failure to fulfil that obligation.

[20] OJ 2007 C 303, p. 17.

[21] See judgment of the European Court of Human Rights ('the ECtHR') of 8 June 1976, *Engel and Others v. the Netherlands* (CE:ECHR:1976:0608JUD000510071).

[22] See, inter alia, judgment of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367, paragraph 34 and the case-law cited).

[23] See, inter alia, judgment of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367, paragraph 35 and the case-law cited).

[24] See, inter alia, judgment of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367, paragraph 36 and the case-law cited).

[25] See, inter alia, judgment of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367, paragraph 38 and the case-law cited).

[26] See, inter alia, judgment of 4 May 2023, *MV – 98* (C-97/21, EU:C:2023:371, paragraph 42 and the case-law cited).

[27] See, inter alia, judgment of 7 July 2022, *Pricoforest* (C-13/21, EU:C:2022:531, paragraph 26).

58. Contrary to the claim made by the Italian Government at the hearing, I do not consider that the fact that the penalty at issue is aimed at a particular group of persons is such as to preclude, in the present case, the *punitive purpose* of that penalty. It is true that the Court was able to rule, with regard to measures aimed not at the general public, but at a particular category of addressees – who, because they pursued an activity specifically regulated by EU law, had to satisfy the conditions required in order to obtain an authorisation issued by the Member States and conferring specific powers on them – that measures consisting in depriving those persons of the exercise of those prerogatives, where the conditions for them were no longer or might no longer be satisfied, do not necessarily have a punitive purpose. [28] In my view, however, that case-law is not relevant in the case of a fine like that at issue in the main proceedings, the purpose of which is certainly not to deprive a particular category of persons of the exercise of certain prerogatives. It is irrelevant, in that regard, that the fine may be imposed on its own or in conjunction with a prohibition on activity for a maximum period of two years.

59. With regard to the *third criterion*, namely the *degree of severity of the administrative penalty*, it is clear from the clarifications given on that point at the hearing that the penalty seems to have a high degree of severity.

60. In that regard, it should be recalled that the degree of severity is determined by reference to the maximum potential penalty for which the relevant provisions provide. [29]

61. The fact that, according to the information provided to the Court at the hearing, the offence at issue in the main proceedings was punishable by a fine of up to EUR 1 660 demonstrates the severity of that penalty.

62. All those factors lead me to believe that two of the *Engel* criteria are satisfied and that the referring court could find that the penalty at issue in the main proceedings is criminal in nature for the purposes of Article 49(1) of the Charter. Furthermore, I note that the Court seems to have already held, impliedly, that an administrative fine imposed for an infringement of Regulation No 3821/85 constitutes a penalty of a criminal nature for the purposes of the Charter. [30]

63. Consequently, it appears highly unlikely to me that, on the basis of the information available to it, the referring court will conclude that the fine at issue in the main proceedings does not constitute a penalty of a criminal nature. However, if it were to reach that conclusion, the last sentence of Article 49(1) of the Charter would not be applicable. It should, therefore, be determined whether similar consequences could be drawn from a general principle of EU law that would extend the principle of the retroactive application of the more lenient criminal law to all administrative penalties, without it being necessary to establish their criminal nature.

64. In my view, that is not the case.

65. Although the Court has stated that, even before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal value as the Treaties, the principle of the retroactive application of the more lenient criminal law followed from the constitutional traditions common to the Member States and, therefore, had to be regarded as forming part of

[28] See judgments of 23 March 2023, *Dual Prod* (C-412/21, EU:C:2023:234, paragraph 33), and of 14 September 2023, *Vinal* (C-820/21, EU:C:2023:667, paragraph 53).

[29] See, inter alia, judgment of 4 May 2023, *MV – 98* (C-97/21, EU:C:2023:371, paragraph 46 and the case-law of the ECtHR cited).

[30] See judgment of 24 March 2021, *Prefettura Ufficio territoriale del governo di Firenze* (C-870/19 and C-871/19, EU:C:2021:233, paragraph 49).

the general principles of EU law, which national courts must respect when applying national legislation,[31] it did so for offences which were criminal in nature. From that point of view, the general principle of EU law thus highlighted by the Court coincides with the principle now enshrined in the last sentence of Article 49(1) of the Charter.

66. However, I do not believe that the principle of the retroactive application of the more lenient criminal law should apply, as a general principle of EU law, to administrative penalties which are not of a criminal nature. To extend that principle to such penalties would make redundant the prior verification of the criminal nature of a penalty for the purposes of the application of Article 49(1) of the Charter, which would be contrary to the wish of the drafters of that provision to confine it to criminal matters. Moreover, it would not seem possible to base any such extension on constitutional traditions common to the Member States.

67. I observe, in this regard, that a number of Member States apply the principle of the retroactive application of the more lenient criminal law to measures which could be classified as 'administrative penalties', without such application being limited to measures of a criminal nature for the purposes of the ECHR and the Charter.[32] However, in those Member States, the application of that principle is, depending on the case, based on constitutional or legislative provisions or case-law.[33] It is thus doubtful that the principle of the retroactive application of the more lenient criminal law, applied outside the scope of 'criminal' matters, follows from constitutional traditions common to the Member States.

68. Accordingly, in my view there is no possibility that that principle applies, as a general principle of EU law, to administrative penalties which do not fall within the scope of Article 49(1) of the Charter.

69. By contrast, Member States remain free to apply such a principle under Article 53 of the Charter as a national standard of protection, while observing the primacy, unity and effectiveness of EU law.[34]

70. The fact that the Court has already held that the second sentence of Article 2(2) of Regulation (EC, Euratom) No 2988/95[35] constitutes a specific expression of the principle of the retroactive application of the more lenient penalty[36] would not seem to me to suggest a different conclusion. It would appear, in fact, that the very existence of such a provision shows that that principle,

[31] See, inter alia, judgments of 3 May 2005, *Berlusconi and Others* (C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraphs 68 and 69), and of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, paragraph 25 and the case-law cited).

[32] According to Research Note 24/002, that is the case, for example, in *Bulgaria*, *Germany*, *Greece*, *Spain*, *France*, *Lithuania*, *the Netherlands*, *Poland*, *Portugal*, *Slovenia*, *Slovakia* and *Sweden*.

[33] Thus, in the Member States cited in footnote 32 to this Opinion, the application of that principle is based on rules from legislation or case-law covering all or only some administrative penalties, without prior classification of whether or not those penalties are criminal in accordance with the *Engel* criteria. In *Bulgaria*, *Spain* and *Lithuania*, the application of the principle of retroactivity *in mitius* to administrative penalties in the broad sense is recognised by a law. In *Germany*, *the Netherlands* and *Poland*, a law recognises the application of that principle to financial administrative penalties. In *Portugal*, *Slovenia* and *Slovakia*, a law expressly provides for its application in accordance with a constitutional provision which also provides for the general existence of that principle. In *Greece* and *France*, the application of the principle of retroactivity *in mitius* to administrative penalties, although not expressly laid down by a constitutional or legislative provision, is based on a rule of case-law stemming from other principles which themselves have constitutional status. Lastly, in *Sweden*, there is no legislation or case-law which recognises a general principle of retroactivity *in mitius* to administrative penalties, but Swedish courts apply that principle by analogy with the existing rules on criminal penalties.

[34] See, inter alia, judgment of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraph 110 and the case-law cited).

[35] Council Regulation of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1). Under that provision, 'in the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively'.

[36] See, inter alia, judgments of 11 March 2008, *Jager* (C-420/06, EU:C:2008:152, paragraphs 59 and 60), and of 4 October 2012, *ED and F Man Alcohols* (C-669/11, EU:C:2012:618, paragraphs 52 and 53).

applied to administrative penalties which are not criminal in nature, does not exist autonomously as a general principle of EU law outside the scope of criminal matters, but requires the adoption of specific legislative provisions.

2. The legislature's intention to adopt a more lenient criminal law

71. According to the Court's case-law, 'the application of [the principle of the retroactive application of the more lenient criminal law] presupposes a succession of legal regimes over time and is based on the conclusion that that succession reflects, in the legal system concerned, a change of position either as regards the criminal classification of the act liable to constitute an offence or as regards the penalty to be applied to such an offence'. [37]

72. Consequently, that principle applies where the changes to the rules in force are favourable to the perpetrator of the offence either because of a modification in the criminal classification of the act or because of a more lenient penalty. [38]

73. Furthermore, the application of the principle of the retroactive application of the more lenient criminal law requires a revised assessment by the legislature as to whether the previously established system of penalties is commensurate. [39] The changes to the rules in force must, therefore, reflect a change of the legislature's position on the criminal classification of the act or the penalty to be applied to an offence. [40]

74. That is not the case where the amendment of the applicable law, which occurs after the offence has been committed, constitutes, in respect of that offence, a simple change in a factual situation which is not capable of changing the constituent elements of that offence. The Court could thus rule that acquisition of EU citizenship constitutes a factual situation which is not capable of changing the constituent elements of the offence of facilitation of illegal immigration. [41]

75. It follows from the Court's case-law that there is also no change of the legislature's position on the criminal classification of the act or the penalty to be applied to an offence where the amendment of rules is the result of a purely economic and technical assessment which does not call into question the criminal classification or the assessment by the competent national authority of the penalty to be applied to conduct having the effect of unduly securing an advantage, even if that advantage should now be recognised under the new rules. [42]

37 See, inter alia, judgment of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraph 107 and the case-law cited).

38 I note that the ECtHR has also ruled that the principle of the retroactive application of the more lenient criminal law applies not only to the penalty incurred, but also in respect of the definition of the offence; see, inter alia, judgment of the ECtHR of 18 October 2022, *Mørck Jensen v. Denmark* (CE:ECHR:2022:1018JUD006078519, § 46). See also Advisory Opinion of the ECtHR of 29 May 2020 concerning the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law (Request No P16-2019-001, § 82).

39 See judgments of 11 March 2008, *Jager* (C-420/06, EU:C:2008:152, paragraph 70), and of 4 October 2012, *ED and F Man Alcohols* (C-669/11, EU:C:2012:618, paragraph 59).

40 See judgments of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, paragraph 27); of 7 August 2018, *Clergeau and Others* (C-115/17, EU:C:2018:651, paragraph 33); and of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraph 107).

41 See judgment of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, paragraphs 32 to 36). See also judgment of the ECtHR of 18 October 2022, *Mørck Jensen v. Denmark* (CE:ECHR:2022:1018JUD006078519, § 44 to 54).

42 See judgment of 7 August 2018, *Clergeau and Others* (C-115/17, EU:C:2018:651, paragraphs 34 to 40).

76. In those different cases, in the absence of any wish on the part of the legislature to repeal or reduce the punishment for certain conduct, the normative change does not call into question the unlawfulness of previous conduct, which must still be penalised for reasons of effectiveness of punishment.

77. It is a different matter in the present case in my view.

78. The insertion by Regulation 2020/1054 of a point (r) in Article 13(1) of Regulation No 561/2006, which permits Member States to grant an exception from the obligation for vehicles used for the delivery of ready-mixed concrete to be fitted with a tachograph, and the definition of the exceptions given in Paragraph 2(2) of Law No 461/2007, through a general reference to Article 3 and Article 13(1) of Regulation No 561/2006, show a change of position of the EU legislature and the Slovak legislature regarding the need to impose that obligation on that category of vehicles and, consequently, regarding the objectionable nature of a failure to have a tachograph or a valid inspection for it for that category of vehicle. The reason for that change of position seems to lie in the particular characteristics of transportation of ready-mixed concrete, which is over relatively short distances, with the result that the appropriateness of requiring the presence of a tachograph in vehicles transporting such concrete could be called into question.

79. Thus, in so far as the amendment of the legislation permits Member States to exclude vehicles used for the delivery of ready-mixed concrete from the obligation to be fitted with a tachograph, it is possible to discern a change in view on the part of the EU legislature, followed by the Slovak legislature, which availed itself of that option, as regards the need to punish failure to fulfil that obligation for that category of vehicle. In so far as that amendment of legislation results in the exclusion of drivers of vehicles used for the delivery of ready-mixed concrete from the group of persons who may be accused of having committed the offence referred to in Paragraph 38 of Law No 462/2007, it does not constitute either an external factual situation or a purely economic and technical assessment that is unconnected with the definition of the constituent elements of that offence.

80. It is irrelevant in that regard that the statutory basis for the offence in Paragraph 38 remains unchanged. The normative change resulting from the option offered to Member States to introduce exceptions for certain categories of vehicle appears in an ancillary provision to the law establishing the criminal offence, which governs the factual situations constituting the offence. As is the case in a number of Member States, I consider that the principle of the retroactive application of the more lenient criminal law should apply fully to this kind of situation. [43]

81. It follows from the foregoing considerations, in my view, that the principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter, is to be interpreted as applying both at the time of the imposition of administrative penalties in accordance with Article 19(1) of Regulation No 3821/85 and Article 41(1) of Regulation No 165/2014 and at the time of the judicial review of such penalties, where those penalties have a criminal nature and the new law, by repealing the obligation for vehicles used for the delivery of ready-mixed concrete to be fitted with a tachograph, reflects a change of position of the legislature regarding the need to punish failures to fulfil that obligation.

[43] Thus, as is stated in Research Note 24/002, in *Germany*, *Spain*, *Italy* and *Poland*, according to the case-law on the question whether the principle of retroactivity *in mitius* applies in such a situation – described in the German, Italian and Polish legal order as a 'blanket rule' ('Blankettnorm', 'norma in bianco' and 'norma blankietowa' respectively) and in the Spanish legal order as a 'blanket offence' ('infracción en blanco') – that principle has been considered, as a general rule, to be fully applicable.

C. The third and fourth questions referred for a preliminary ruling

82. By its third and fourth questions, which should, in my view, be examined together, the referring court asks the Court to rule, in essence, whether the principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter, requires the referring court to take into account, in the appeal in cassation which has been brought before it, a more favourable criminal law which entered into force after the decision of the lower administrative court, which has become final under national law and against which that appeal has been brought.

83. The referring court thus wishes to know whether that principle is to be applied at all stages of the judicial proceedings, including the stage of the appeal in cassation, having regard to the specific legal characteristics of that phase of the judicial proceedings, where the more favourable law entered into force during that phase. The court states that that question has not been answered unequivocally within its constituent chambers. [44]

84. The referring court states in that regard that it must take into account, even in the absence of a request to that effect, the fundamental principles for determining the penalty, including the principle of the retroactive application of the more lenient criminal law. [45] However, it is also bound by the legal situation existing when the decision of the lower administrative court, which has become final and enforceable, [46] was delivered. [47] That decision has the force of *res judicata*. [48]

85. That court adds that the appeal in cassation is regarded in theory as an extraordinary remedy, precisely because it is directed against a final decision of an administrative court. However, the grounds on which an appeal in cassation may be brought are set out broadly and, in principle,

[44] The referring court explains, in that regard, that its First Chamber has answered that question in the affirmative. By contrast, its Fifth Chamber considers that, given the nature of the appeal in cassation and the principle that it is necessary to review a decision given by a lower administrative court which has become final, the answer to that question must be in the negative.

[45] Paragraph 195(d) of zákon č. 162/2015 Z. z. Správny súdny poriadok (Law No 162/2015 establishing the Code of administrative court procedure) of 21 May 2015 ('the CACP') thus provides that, when reviewing an administrative decision, the administrative court is not bound by the scope and the grounds of the action of the administration in respect of compliance with the principles governing penalties under the Trestný zákon (Criminal Code) – including the principle of retroactivity *in mitius* – which must also therefore be applied to the imposition of administrative penalties.

[46] It follows from Paragraph 145(2)(c) of the CACP that, in administrative proceedings relating to administrative penalties, the judgment of an administrative court becomes final, including where an appeal in cassation is brought within a period of one month from notification of that judgment. Furthermore, it follows from Paragraph 146(1) of the CACP that a judgment is enforceable upon the expiry of the time limit for complying with the obligation which the administrative court has fixed in the operative part or, failing that, once it acquires the force of *res judicata*.

[47] It thus follows from Paragraph 454 of the CACP that the situation existing at the time when the contested decision of the administrative court was delivered or made is decisive for the purposes of the decision of the court hearing the appeal in cassation.

[48] Under Paragraph 145(5) of the CACP, where a final decision has been given in a matter, that matter may no longer be adjudicated on or give rise to a new decision.

cover all legal and procedural defects.[49] In addition, if the procedural conditions are met, the appellant is entitled to have the appeal decided and to have the appeal in cassation proceedings follow regularly and directly the proceedings before the lower administrative court.[50]

86. The referring court is thus seeking to ascertain, first, to what extent the finality of a judicial decision plays a role in determining whether the principle of the retroactive application of the more lenient criminal law is applicable. Second, it asks whether the specific legal characteristics of the appeal in cassation constitute a procedural obstacle to the application of that principle.

87. I will examine those two aspects in turn.

1. The finality of a judicial decision for the purposes of the application of the principle of the retroactive application of the more lenient criminal law

88. It must now be determined whether the application of the principle of the retroactive application of the more lenient criminal law may be excluded in appeal in cassation proceedings like those at issue in the main proceedings on the ground that those proceedings, the purpose of which is to review the decision delivered by a lower administrative court, follow proceedings by which that lower court made a decision which has become final under Slovak law.

89. I note in this regard that the last sentence of Article 49(1) of the Charter is drafted in very broad terms without fixing a time limit for the rule that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that lighter penalty is applicable. In particular, that provision does not refer to any limit relating to the existence of a judicial decision which has become final.

90. That being said, the Court has already acknowledged that that principle does not preclude national legislation which maintains the deprivation of the right to vote resulting, by operation of law, from a criminal conviction only in respect of final convictions by judgment delivered at last instance under the old Criminal Code, despite the subsequent adoption of a law which is more favourable to the convicted person.[51] Accordingly, the aforementioned principle does not require that final judgments delivered at last instance be revised where more lenient criminal legislation subsequently enters into force.[52]

[49] Those grounds are set out in Paragraph 440(1) of the CACP: the administrative court did not have jurisdiction to rule on the dispute (point (a)); a party to the dispute did not have standing to bring proceedings (point (b)) or did not have full capacity to act independently before the administrative court and was not represented by a legal representative or legal guardian acting on his or her behalf (point (c)); the same matter has already been finally decided or proceedings have already been initiated in the same matter (point (d)); the matter was settled by a disqualified judge or by an incorrectly constituted administrative court (point (e)); by an inappropriate procedure, the administrative court prevented a party from exercising his or her procedural rights such that the right to a fair trial was breached (point (f)); the administrative court ruled on the basis of an error in law (point (g)); the administrative court decided to depart from the settled case-law of the court of cassation (point (h)); the administrative court did not comply with the binding legal opinion given in the annulment decision taken on the appeal in cassation (point (i)); or the action was unlawfully dismissed (point (j)).

[50] In accordance with Paragraph 438(1) of the CACP, an appeal in cassation may be brought against final decisions of an administrative court. Furthermore, under Paragraph 439(1) of the CACP, the appeal in cassation is, in principle, admissible against all decisions of administrative courts.

[51] See judgment of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 56).

[52] It should be noted, however, that the ECtHR has applied the principle of the retroactive application of the more lenient criminal law to a person convicted by final judgment in so far as national law expressly imposed on national courts the obligation to revise a conviction of their own motion where a subsequent law reduced the applicable penalty for an offence; see judgment of the ECtHR of 12 January 2016, *Gouarré Patte v. Andorra*, (CE:ECHR:2016:0112JUD003342710, §§ 28 to 36).

91. By contrast, the principle of the retroactive application of the more lenient criminal law is applicable until a final judgment has been delivered. It is, therefore, crucial to examine in each case whether such a judgment has been delivered.

92. It follows from the case-law of the Court that Article 49 of the Charter contains, at the very least, the same guarantees as those provided for in Article 7 ECHR, which must be taken into account by virtue of Article 52(3) of the Charter as a minimum threshold of protection. [53]

93. According to the case-law of the ECtHR, the principle of the retroactive application of the more lenient criminal law, which is guaranteed by Article 7(1) ECHR, 'is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted *before a final judgment is rendered*, the courts must apply the law whose provisions are most favourable to the defendant'. [54]

94. The concept of 'final judgment' is not mentioned, still less defined, in Article 49(1) of the Charter. However, in so far as that concept is crucial in deciding whether the principle of the retroactive application of the more lenient criminal law enshrined in that provision is applicable, and in the interest of a uniform application of that principle within the European Union, it is necessary to establish certain characteristics for delineating its scope. To that end, it is possible to rely on the concept of 'final' in Article 50 of the Charter, which enshrines the principle *ne bis in idem*, and, here too, to draw lessons from the case-law of the ECtHR concerning that principle.

95. In this regard, it should be noted that the aim of Article 4 of Protocol No 7 to the ECHR [55] is to prohibit the repetition of criminal proceedings (the principle *ne bis in idem*) that have been concluded by a final decision. According to the Explanatory report on Protocol No 7 to the ECHR, [56] 'a decision is final if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case *when it is irrevocable*, that is to say when no further *ordinary remedies* are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them'. [57] Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No 7 as long as the time limit for lodging such an appeal has not expired. On the other hand, *extraordinary remedies* such as a request for the reopening of the proceedings or an application for extension of the expired time limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although those remedies represent a continuation of the first set of proceedings, the 'final' nature of the decision does not depend on their being used. [58]

96. In order to decide whether a decision is final, the ECtHR seeks to establish, on the basis of domestic law, the 'ordinary remedies' in a particular case for the purposes of Article 4 of Protocol No 7. Domestic law – both substantive and procedural – must satisfy the principle of legal certainty, which requires both that the scope of a remedy be clearly circumscribed in time and that the procedure for its use be clear for those parties that are permitted to avail themselves of

[53] See, inter alia, judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 92 and the case-law cited).

[54] Judgment of the ECtHR of 17 September 2009, *Scoppola v. Italy (No 2)* (CE:ECHR:2009:0917JUD001024903, § 109), emphasis added. See also decision of the ECtHR of 30 November 2021, *Artsruni v. Armenia* (CE:ECHR:2021:1130DEC004112613, § 55), and judgment of the ECtHR of 18 October 2022, *Mørck Jensen v. Denmark* (CE:ECHR:2022:1018JUD006078519, § 44).

[55] Signed in Strasbourg on 22 November 1984; 'Protocol No 7'.

[56] *European Treaty Series*, No 117.

[57] See judgment of the ECtHR of 10 February 2009, *Sergey Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903, § 107). Emphasis added.

[58] See judgment of the ECtHR of 10 February 2009, *Sergey Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903, § 108).

the remedy in question. In other words, for the principle of legal certainty to be satisfied, a principle which is inherent in the right not to be tried or punished twice for the same offence, the remedy procedure must bring clarity to the point in time when a decision becomes final. The requirement of a time limit in order for a remedy to be regarded as 'ordinary' is implicit in the wording of the Explanatory report on Protocol No 7 to the ECHR, which states that a decision is irrevocable where the parties have permitted the 'time limit' to expire without availing themselves of the remedy in question. A law conferring an unlimited discretion on one of the parties to make use of a remedy or subjecting that remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty. [59]

97. The ECtHR has also held that, although the ECHR undoubtedly allows States to define what, under their domestic law, constitutes a decision by which criminal proceedings are terminated with final effect, it is subject to scrutiny by the ECtHR. To permit the Contracting States to determine as they saw fit when a decision was 'final' for the purposes of Article 4 of Protocol No 7, without scrutiny by the ECtHR on the basis of objective criteria, would amount to the application of that provision being left to their discretion, which might lead to results incompatible with the purpose and object of the ECHR, namely to ensure that no one is tried or punished twice for the same offence. [60]

98. Even though the role of the Court of Justice in a reference for a preliminary ruling is different from that of the ECtHR, I believe that a similar logic should be adopted in the present case, reconciling the leeway which must be available to Member States with the effectiveness of the principle of the retroactive application of the more lenient criminal law. Thus, while it is clear that it is for each Member State to define its own system of remedies, in particular the conditions in which an appeal in cassation may be lodged against the decision of an administrative court and the stage of the judicial proceedings from which a judgment may be considered final in domestic law, that leeway must be framed so as to guarantee the uniform application of that principle within the European Union and to ensure that it can be fully effective. [61]

99. Consequently, although the finality of a judicial decision must be assessed on the basis of the law of the Member State in which it was taken, [62] the finality of such a decision for the purposes of the application of Article 49(1) of the Charter cannot, however, be established *where that decision has not become irrevocable, such that it may be challenged by an ordinary remedy that may be exercised, by the person convicted, with a given time limit*. Thus, although the starting point for that assessment must be national law, it is not possible to adhere purely and simply to the classifications adopted in national law, otherwise the effective and uniform application of the principle of the retroactive application of the more lenient criminal law, as enshrined in Article 49(1) of the Charter, would be undermined. If the examination of national law shows that

[59] See judgments of the ECtHR of 8 July 2019, *Mihalache v. Romania* (CE:ECHR:2019:0708JUD005401210, § 115), and of 8 October 2024, *Jesus Pinhal v. Portugal* (CE:ECHR:2024:1008JUD004804715, § 177).

[60] See judgment of the ECtHR of 8 July 2019, *Mihalache v. Romania* (CE:ECHR:2019:0708JUD005401210, § 116). For an example where a decision became final by a judgment delivered by the Cour de cassation (Court of Cassation, France), see judgment of the ECtHR of 6 September 2019, *Nodet v. France* (CE:ECHR:2019:0606JUD004734214, §§ 21 and 46).

[61] See, inter alia, judgment of 15 October 2024, *KUBERA* (C-144/23, EU:C:2024:881, paragraph 31 and the case-law cited), in which the Court held that although the organisation of justice in the Member States, in particular, the establishment, composition, powers and functioning of national supreme courts, falls within the competence of those States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.

[62] See, by analogy, judgment of 12 October 2023, *INTER CONSULTING* (C-726/21, EU:C:2023:764, paragraph 61).

the decision made by an administrative court may be challenged before a higher court through the exercise, by the person convicted, of a remedy within a given time limit, that principle should, in my view, be applied.

100. In other words, for the purposes of the application of the principle of the retroactive application of the more lenient criminal law, proceedings in which a final ruling has not been made are, therefore, similar to proceedings which have not given rise to a decision which has become irrevocable,[63] that is to say, a decision for which the ordinary remedies have been exhausted or have not been exercised within the required time limits.

101. In that respect, I consider that even though the appeal in cassation before the referring court seems to be regarded in theory as an extraordinary remedy under Slovak law, because it is directed against a decision of an administrative court which is final under that law, that appeal does not appear, in view of its characteristics as outlined by the referring court itself, to have the features of an extraordinary remedy.

102. As is apparent from the provisions of the CACP which I have cited above, the exercise of the appeal in cassation before the referring court is not subject to restrictive limitations of such a kind, in particular as regards the grounds on which it may be brought or the persons authorised to lodge it, that it ought to be treated as an extraordinary remedy. In other words, in so far as under Slovak law, the bringing of an appeal in cassation does not appear to have a strictly circumscribed and exceptional nature,[64] it constitutes an ordinary remedy which represents the continuation of the judicial proceedings instituted by T.T. before the administrative court and which can result in a challenge, within a given time limit, to the judgment delivered by that court.

103. Slovak law in fact reflects the difference in nature between the function of the court hearing the substance, which is to 'judge the dispute', and the function of the court of cassation, which is to 'judge the judgment'. That difference is manifested in two distinct judicial phases. Accordingly, the decision made by the former becomes final, that is to say, it has the force of *res judicata*. However, in so far as that decision may be subject to an appeal in cassation and may thus be challenged, it is not irrevocable. It would seem that it is necessary, therefore, for a distinction to be drawn under Slovak law between decisions which have become final and decisions which are irrevocable, the latter being those against which all ordinary remedies, including the appeal in cassation, have been exercised or have not been exercised within the required time limit.

104. What matters, however, for the purposes of applying the principle of the retroactive application of the more lenient criminal law is to determine, going beyond the specific procedural distinctions and classifications of each national legal order, whether the decision delivered by an administrative court has become irrevocable such that it may no longer be challenged before a higher court through the exercise, by the convicted person, of a remedy within a given time limit. A judicial decision which is not irrevocable under the law of the

[63] For example, the Conseil d'État (Council of State, France) ruled, in Judgment No 443476 of 7 October 2022, in terms which, in my view, are worth reproducing for the purposes of this analysis, that the constitutional principle of necessity of penalties implies 'the rule that, where it repeals an offence or provides for less severe penalties than the old law, the new punitive law must apply to perpetrators of offences committed before it entered into force *which have not given rise to decisions which have become irrevocable*. The court hearing the substance in a dispute concerning a penalty must apply, even of its own motion, a new, more lenient punitive law which entered into force between the date when the offence was committed and the date when it rules. *The same holds for the court of cassation if the new law entered into force subsequent to the decision under appeal*' (paragraph 5 of that judgment, emphasis added). For administrative proceedings, other Member States recognise the application of the principle of the retroactive application of the more lenient criminal law where that law is introduced at the stage of the appeal in cassation. According to Research Note 24/002, that is the case, inter alia, in Bulgaria, Germany, Spain, Italy and Lithuania.

[64] See judgment of 19 October 2023, *Központi Nyomozó Főügyészség* (C-147/22, EU:C:2023:790, paragraph 34).

Member State cannot constitute a procedural obstacle to the application of that principle.[65] For the reasons set out above, it cannot be found that a decision has become irrevocable in the present case. It follows that that principle is fully applicable.

105. I would add that it is irrelevant, in this regard, whether the contested administrative penalty has now become enforceable, whether it has even actually been enforced and whether it cannot be directly annulled or replaced by the referring court,[66] since the setting aside of the judgment delivered by the lower administrative court and the remittal of the case to that court,[67] or some other judicial technique,[68] may be capable of guaranteeing the rights which the applicant derives from the last sentence of Article 49(1) of the Charter, resulting in the annulment of that penalty and reimbursement of the fine unduly collected. Moreover, the very existence of the possibility for the court of cassation, if it finds that the appeal is well founded, to remit the case to the administrative court, giving rise to a re-examination of the substance of the case, demonstrates that the judgment under appeal cannot be seen as being irrevocable for the purposes of the application of the aforementioned provision.

2. Do the specific legal characteristics of the appeal in cassation constitute a procedural obstacle to the application of the principle of the retroactive application of the more lenient criminal law?

106. In the case of the adoption of an administrative penalty of a criminal nature in accordance with the *Engel* criteria, there is no doubt that the principle of the retroactive application of the more lenient criminal law applies. The same holds, in respect of the judicial review of such a penalty, for a more lenient law introduced in the course of the proceedings before the court hearing the substance.

107. If the court hearing the substance does not take into account a more lenient criminal law which is introduced before it has given its decision, it thus commits an error of law which may be sanctioned by the court of cassation, giving full effect to that principle.

108. Should it be any different where the more lenient criminal law enters into force in the course of the proceedings before the court of cassation? That is the question which must now be addressed.

109. The referring court's doubts regarding the applicability of that principle where the new law enters into force after an appeal in cassation has been lodged arise because of the particular nature of that judicial phase. The court of cassation adjudicates on the law and, unlike the lower courts, not on the substance. The substance of the case is thus finally decided by the lower courts and may no longer be re-examined by the court of cassation, the role of which is to review whether the lower courts correctly applied the rule of law.

[65] See, by analogy, judgment of 12 October 2023, *INTER CONSULTING* (C-726/21, EU:C:2023:764, paragraph 61).

[66] The Slovak Government has informed the Court in this regard that, unlike the lower administrative court, the court of cassation does not have jurisdiction to vary the decision on the penalty.

[67] See, in that regard, Paragraph 462(1) of the CACP, which provides for the possibility for the court of cassation, after it has found that the appeal in cassation is well founded, to remit the case to the lower administrative court.

[68] Under Paragraph 462(2) of the CACP, if the court of cassation finds that the contested decision or the contested measure of the administrative authority does not comply with the law and the lower administrative court has dismissed the action, it may vary the decision of that court by annulling the contested decision or the contested measure of the administrative authority and by remitting the case to it for the further proceedings.

110. The courts hearing the substance cannot be criticised, in terms of an error of law, for not having applied a law which was not in force at the time when they gave their ruling.

111. That is the situation at issue in the present case, since the Krajský súd v Bratislave (Regional Court, Bratislava), acting in its capacity as an administrative court, delivered a judgment which is classified as 'final' under Slovak law. Subsequent to that judgment, a new law entered into force. For obvious temporal reasons, that court was not able to take that law into account in its judgment. The question is then whether the court of cassation, whose role is to review whether the court hearing the substance correctly applied the law, must take that new law into account, notwithstanding the aforementioned temporal impossibility, in order to annul the decision of the court hearing the substance, if appropriate, and, as the case may be, remit the case to it.

112. In my view, that question must be answered in the affirmative.

113. According to settled case-law, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality. [69] That principle is one of the general principles of EU law which must be observed by any national legislation which falls within the scope of EU law or which implements that law, including in the absence of harmonisation of EU legislation in the field of penalties applicable. [70]

114. In so far as the principle of the retroactive application of the more lenient criminal law is linked to the principle of necessity and proportionality of penalties, [71] which is itself enshrined in Article 49(3) of the Charter, I believe that it should be given a broad scope such that it can be applied immediately to perpetrators of offences committed before the new law entered into force which have not given rise to decisions that have become irrevocable. If the legislature has decided to mitigate the severity of the old law, it is because it recognises that the objectionable nature of certain conduct and/or the penalty previously provided for are no longer strictly necessary.

115. As is rightly stated by the referring court, that principle thus means that, once the societal need to punish certain conduct has disappeared or the severity of the perception of that conduct, as reflected in the degree of severity of the penalty, has changed, there is no just and reasonable cause for all 'historic' offences and their perpetrators to continue to be prosecuted if the harmfulness of the historically penalised conduct and the severity of the penalty for that conduct are now perceived differently by the legislature.

116. It follows that the principle of the retroactive application of the more lenient criminal law is applicable where such a law enters into force before the decision given on appeal, which includes where the court of cassation carries out a review limited to errors of law. The court ruling at last instance is thus required to apply the more lenient criminal law, whether it is introduced before or after the decision of the lower administrative court which it is called upon to review.

117. In order to give full effect to the principle of the retroactive application of the more lenient criminal law, it is necessary to neutralise the procedural distinctions connected with the various phases of the proceedings during which that principle is applicable. The characteristics of

69 See, inter alia, judgment of 21 November 2024, *Ekostroy* (C-61/23, EU:C:2024:974, paragraph 41 and the case-law cited).

70 See, inter alia, judgment of 21 November 2024, *Ekostroy* (C-61/23, EU:C:2024:974, paragraph 42 and the case-law cited).

71 See judgment of the ECtHR of 17 September 2009, *Scoppola v. Italy (No 2)* (CE:ECHR:2009:0917JUD001024903, § 108).

administrative proceedings, which are specific to each Member State (such as the finality or force of *res judicata* of the judgment delivered by the lower administrative court or whether or not the appeal in cassation has suspensory effect), should not result in the temporal scope of the principle of the retroactive application of the more lenient criminal law being limited to certain phases of the judicial proceedings, as long as the offence at issue has not given rise to a decision which has become irrevocable.

118. In particular, the function of the court of cassation must be adjusted in order to permit it to apply the more favourable criminal law which entered into force subsequent to the judgment under appeal and which the lower administrative court was not able to take into account on the date when its judgment was delivered. The court of cassation must, therefore, have the possibility to uphold the appeal, even though the judgment under appeal before it cannot, in principle, be considered to be vitiated by an error of law solely because it did not apply a law which was not in force when it was delivered. That must lead that court to disregard or interpret in conformity with EU law the provisions of its national law [72] which could prevent it from performing its function in accordance with the principle of the retroactive application of the more lenient criminal law.

119. If the unique nature of the appeal in cassation is thereby diminished, [73] that is the inevitable consequence of the broad scope which should be given to that principle.

120. I note in that regard that in a number of Member States the court of last instance for administrative penalties is required to take into consideration a more lenient law, even if that law is only introduced during the proceedings before it. [74]

121. It follows from all of the foregoing that, in my view, neither classification as a 'final' judgment under Slovak law, nor the fact that the appeal in cassation might be perceived as an extraordinary remedy under Slovak law, nor the specific procedural characteristics of the appeal in cassation

[72] In this case, this is primarily Paragraph 454 of the CACP, which provides, it should be recalled, that the function of the court of cassation in administrative matters is to determine whether the lower administrative court erred in law with regard to the situation existing at the time when it made the decision under appeal.

[73] See Éveillard, G., 'L'application de la rétroactivité *in mitius* par le juge administratif de cassation', *Droit administratif*, LexisNexis, Paris, No 1, 2023, pp. 44 to 48. The author makes reference, with regard to the decision of the Conseil d'État (Council of State) – acting as the court of cassation – on account of the introduction of a new element such as a more favourable punitive law during the cassation proceedings, to an '*objective' form of cassation*. In such a case, the decision of the court of cassation does not have a 'penalising aim' in the sense that it does not express any disapproval regarding the manner in which the court hearing the substance applied the rule of law as it existed at the time when it gave its decision (p. 47). Similarly, reference was made to a 'notch in the blueprint of the traditional function of the court of cassation', which goes beyond its 'traditional mission of reviewing the legal rectitude of the decision under appeal', and to an '"objective" cassation practice for judgments which were sound at the time when they were delivered'; see submissions of the rapporteure publique, Ms Céline Guibé, under Judgment No 443476 of the Conseil d'État (Council of State) of 7 October 2022 (point 4.2.2). It is also interesting to note that, in the case which gave rise to that judgment, that court had to deal with the same questions which the referring court has asked the Court in the present case, but from the perspective of the principle of necessity of penalties, which has constitutional status.

[74] Thus, according to Research Note 24/002, in *Germany*, the Gesetz über Ordnungswidrigkeiten (Law on administrative offences) of 24 May 1968 (BGBl. 1968 I, p. 481), last amended by the Law of 12 July 2024 (BGBl. 2024 I, No 234), provides, in respect of administrative fines, that the principle of retroactivity *in mitius* is applicable to all amendments made 'before the decision', that wording being understood, in the general view, to include the decision given on appeal ruling on matters of law alone; see, to that effect, Rogall, K., 'Rückwirkung des milderen Gesetzes', in Mitsch, W., *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten*, 5th ed., C.H. Beck, Munich, 2018, paragraph 27, and Graf, J-P., *Beck'scher Online-Kommentar OWiG*, 44th ed., C.H. Beck, Munich, 2024; see footnote 59, paragraph 24. In *Spain*, the principle of the retroactive application of the more lenient law in respect of administrative penalties follows from Article 9(3) of the Constitución (Constitution) and Article 26(2) of Ley 40/2015, de Régimen Jurídico del Sector Público (Law 40/2015 on the legal system governing the public sector) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89411). Consequently, the Administrative Litigation Division of the Tribunal Supremo (Supreme Court, Spain), which is the highest court in relation to administrative penalties, applies the most lenient law, even where it entered into force during the proceedings before it; see Judgment No 1219/2019 of the Tribunal Supremo (Supreme Court) of 23 September 2019. In *France*, despite the force of *res judicata* attached to the judgment delivered by the cour administrative d'appel (Administrative Court of Appeal) and the lack of suspensory effect of the appeal in administrative matters, the Conseil d'État (Council of State) developed its case-law with regard to administrative penalties by Judgment No 443476 of 7 October 2022, which I have cited above (see footnotes 63 and 73 to this Opinion).

should preclude the application of the principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter, without excessively restricting its scope.

V. Conclusion

122. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) as follows:

(1) Article 51(1) of the Charter of Fundamental Rights of the European Union

must be interpreted as meaning that a Member State is implementing Union law within the meaning of that provision, first, when it provides, pursuant to Union law, for the imposition of an administrative penalty in the case of failure to fulfil the obligations relating to the presence of a tachograph in vehicles carrying goods and its periodic inspection and, second, in the judicial review of that penalty.

(2) The principle of the retroactive application of the more lenient criminal law, as enshrined in the last sentence of Article 49(1) of the Charter of Fundamental Rights,

must be interpreted as:

– applying both at the time of the imposition of administrative penalties and at the time of the judicial review of such penalties, where those penalties have a criminal nature and the new law, by repealing the obligation for vehicles used for the delivery of ready-mixed concrete to be fitted with a tachograph, reflects a change of position of the legislature regarding the need to punish failures to fulfil that obligation;

– requiring a national court to take into account, in the appeal in cassation which has been brought before it, a more favourable criminal law which entered into force after the decision of the lower administrative court which has become final under national law and against which that appeal has been brought, in so far as that decision has not become irrevocable as it may be challenged through the exercise, by the person convicted, of a remedy with a given time limit.